No. 73-1106

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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

WILLIAM COUSINS, ET AL.,

Petitioners,

vs.

PAUL T. WIGODA, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Illinois Appellate Court

PETITIONERS' REPLY MEMORANDUM

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Petitioners submit that the orders of the Circuit Court of Cook County and the judgment of the Illinois Appellate Court, of which review is sought herein, are directly contrary to the controlling decision of this Court, announced at a special session on the evening of Friday, July 7, 1972, that, in the particular circumstances of the case, the 1972 Democratic National Convention (opening in Miami, Florida on Monday, July 10, 1972) had the right to decide the Chicago and California credentials contests. *Keane* v. *National Democratic Party*, 409 U.S. 1 (1972)(set forth in full as Appendix A) (discussed in the Petition for Certiorari at pp. 21-28).

Respondents' brief in opposition to the Petition for Certiorari does not even attempt to reconcile the action

of the Circuit Court of Cook County in issuing its order on the evening of July 8, 1972—purporting to bar petitioners (one of the contesting Chicago delegations) from participating as delegates in the 1972 Democratic National Convention—with the explicit language of this Court's *per curiam* decision of July 7, 1972 (the night before). This Court's opinion cited the "large public interest in allowing the political processes to function free from judicial supervision" (at p. A-5) and emphasized that "it has been understood since our national political parties first came into being as voluntary associations of individuals that the Convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated." (at p. A-4) Expressly noting that its action "may well preclude any judicial review of the final action of the Democratic National Convention on the recommendation of its Credentials Committee" (at p. A-5), this Court stayed the judgments of the Court of Appeals for the District of Columbia so that the 1972 Democratic National Convention "could decide to accept or reject, or accept with modification, the proposals of its Credentials Committee" on the Chicago and California contests (at p. A-3). On the next evening, the Circuit Court of Cook County simply ignored this Court's decision and issued its order purporting to bar petitioners from acting as delegates in the Convention.

Nor do respondents offer any explanation as to how this Court's action on July 7, 1972 in staying (but not at that time vacating) the judgment of the Court of Appeals for the District of Columbia could be construed, contrary to explicit and unambiguous law (see the Petition for Certiorari at pp. 25-26) and contrary to the clear language of this Court's opinion, as somehow permitting respondents to relitigate the issues in the case in an Illinois state court in an effort to obtain a different result. Indeed, respondents' sole reference to this Court's decision of July 7, 1972, ignoring completely this Court's opinion, consists of the statement (at p. 9 of their brief) that "it is not reasonable to conclude" that this Court's stay of the judgment of the Court of Appeals, which judgment had included an injunction against proceedings in the Circuit Court of Cook County, "was in fact intended to enjoin such proceedings in that court." Respondents' argument appears to be that because this Court did not enjoin proceedings in other courts, respondents were free to seek relief in other courts, *notwithstanding the prior decision of this Court.* When this Court decides a case, it does not customarily issue an injunction against the possibility that the unsuccessful litigants will seek to relitigate the issues in a state court and obtain relief contrary to this Court's decision. This Court has held that injunctions to effectuate its decisions are unnecessary because this Court assumes that state authorities will give "full credence" to its decisions. See *Roe* v. *Wade*, ... U.S. ....., ..., 93 S.Ct. 705, 733 (1973).

The principal contention to which respondents devote their brief (at pp. 7-11)—that the Illinois court was properly acting "to protect its electoral process"—is simply a reiteration of the claim which respondents had asserted unsuccessfully in the Washington D.C. Federal courts, and this Court, in their effort to reverse the Credentials Committee's decision on the Chicago contest prior to the 1972 Convention.* Respondents quote the Court of Appeals for

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* See, *e.g.*, respondents' argument in their Application to this Court on July 6, 1972:

> "There are substantial reasons for the exercise of this Court's discretion to grant a writ of certiorari in the instant case. The Court of Appeals for the District of Columbia has totally ignored the Illinois Election Code and has superimposed upon said Code requirements which disenfranchise the electorate and violate the rights of office-holders. In this context, major issues are presented concerning the rights and relationships

the District of Columbia (at p. 4 of their brief) as stating in the Federal court action that "No violation of Illinois law is at issue here." In fact, the Court of Appeals made that statement in the context of considering, and expressly rejecting, respondents' argument that their election under Illinois law required that they be seated in the National Convention, despite the Rules of the National Democratic Party.* The full quotation from the Court of Appeals decision of July 5, 1972 reads as follows:

> "The challenged delegates claim that the Democratic National Party cannot abridge their right under Illinois law to the delegate seats for which they have been elected. The relationship, in this case, between the Illinois law and the Party's regulations offers no grounds for relief to the challenged delegation. No violation of Illinois law is at issue here. The Illinois election law is, by itself, not incompatible with guideline C-6 of the McGovern Commission. The guideline complements the Illinois law in an area—selection of delegate slates—where the state law is silent. The right of a national political party to determine the qualifications of delegates to its conventions, if exercised within the confines of the Constitution, cannot be defeated merely because an individual delegate has not violated a state law in addi-

(Footnote continued)

> among voters, elected officials, and political parties. It is imperative that this case be heard to vindicate the electoral process."

See also respondents' complaint in the Federal court action (quoted at p. 7 of the Petition for Certiorari).

* Respondents apparently seek to imply some distinction between the Washington, D.C. suit and the instant state court proceedings by noting (at p. 4 of their brief) that the Federal court action was instituted by "a delegate other than Wigoda" (the named plaintiff herein). Both actions were brought as class actions on behalf of all of respondents. Wigoda and Keane (the named plaintiff in the Washington, D.C. Federal court action) share law offices and have been represented in both actions by the same attorney.

> tion to a valid party regulation. To hold otherwise would severely limit the freedom of association of the party itself." (at pp. D-16-D-17)

Subsequently, this Court in its decision of July 7, 1972 upheld the right of the 1972 Democratic National Convention, in the particular circumstances of the case, to decide the Chicago and California contests and to determine whether to seat the delegates elected under Illinois and California law, or the contesting delegations, or possibly some combination of the two.

Respondents' suggestion (at pp. 11-12 of their brief) that petitioners' constitutional rights of free political association were not abrogated by the order of the Circuit Court of Cook County because petitioners were merely barred from participating in the Convention as delegates, and not "from acting in the Convention in some other capacity," is patently frivolous. It was as delegates from the Chicago districts—to rectify respondents' "covert, calculated and deliberate" violations of the National Party Rules (see the Report of the Hearing Examiner included as Appendix D)—that the Credentials Committee, and subsequently the entire Democratic National Convention, determined that petitioners should participate. Rejecting respondents' argument that they should be seated notwithstanding their deliberate violations of National Party Rules, the Credentials Committee and the Convention decided that petitioners, and not respondents, were the delegates who should represent the Chicago districts.*

* Respondents continue to assert various factual and other matters which bear upon the merits of the Democratic Party's decision on the Chicago contest (see, *e.g.*, pp. 7-8, 12 of their brief). Since the wisdom of the Democratic Party's decision is extraneous to the legal issues in the case, petitioners have not sought to respond to these

As a final reason why this Court should now deny relief, respondents offer (at pp. 15-17 of their brief) the new contention, not advanced in the court below and in no way supported by the judgment below, that the case "presents moot and abstract questions." Petitioners submit that the case is neither moot nor abstract for the following reasons (set forth more fully in the Petition for Certiorari):

1. Petitioners are threatened with fines or jail sentences for participation in the 1972 Democratic National Convention in alleged violation of the initial order of the Circuit Court of Cook County appealed from herein.

For more than a year since the 1972 Democratic National Convention, respondents, publicly and in court, have pursued petitioners for alleged contempt of the July 8, 1972 order of the Circuit Court of Cook County ap-

(Footnote continued)
arguments. As a general matter, petitioners would note the judgment of one disinterested observer:

> ". . . Though duly elected in district primaries, these delegates [respondents] had been slated, which is to say, selected as nominees with party endorsement, by procedures that were effectively proof against insurgency, or against participation by outsiders, as insurgency is now called. . . . Their [respondents'] chief argument was that election cures all. It is, in their view, a kind of absolution. But the delegate-selection requirements, unlike some more demanding precept systems, do not provide for absolution, by election or otherwise. They are, by contrast, rather like law that way.
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> ". . . [T]he [Democratic] party will in the long run be strengthened by the decision in the Daley case, as any institution is strenghtened which visibly and painfully submits itself to the process of law, and obeys the rules it has made for its own governance." A. Bickel, "Will the Democrats Survive Miami?" 167 *New Republic* 17, 18 (July 15, 1972).

pealed from herein. The trial judge, after issuing rules to show cause against 62 of petitioners, has deferred criminal contempt trials (which the judge has stated may be lengthy and in which petitioners are threatened with fines or jail sentences), conditioned upon rapid prosecution by petitioners of this appeal. Thus petitioners clearly have a "substantial stake" in the validity of the order appealed from and petitioners are threatened with severe "disabilities or burdens" if the judgment below is not reversed. *Cf. Carafas* v. *LaVallee*, 391 U.S. 234, 237-38 (1968); *Ginsberg* v. *New York*, 390 U.S. 629, 633 (1968).

As noted, the trial judge has deferred the contempt trials pending disposition of this appeal. There is no basis for respondents' suggestion (at p. 16 of their brief) that the trial judge might go forward with contempt proceedings even if his orders are reversed by this Court. There is no logic or precedent to support the suggestion that petitioners might be punished for disobeying an invalid order under circumstances where the effect of the order, if obeyed, would have been irrevocably to deprive the National Democratic Party of its right to decide the Chicago contest and irrevocably to deny petitioners their right to participate in the Convention (opening on July 10, 1972) in accordance with the Convention's decision. Further, this Court (as well as the Court of Appeals for the District of Columbia) had expressly decided the issue in the case in the Federal court action instituted by respondents. The subsequent contrary order of the Circuit Court of Cook County was, as counsel for the Democratic National Committee has stated, "transparently invalid" in light of those prior decisions (see the Petition for Certiorari at pp. 26-27). For these reasons alone, therefore, cases such as *Walker* v. *City of Birmingham*, 388 U.S. 307 (cited by respondents at p. 16 of their brief), which indicate that under some circumstances an unconstitutional order of a

state court must nevertheless be obeyed, have no applicability.[8]

2. The supplemental order of the Circuit Court of Cook County appealed from herein continues to bar petitioners from participating in the selection of Democratic National Committee members from Illinois.

In suggesting that the case now presents "moot and abstract questions" (at pp. 15-17 of their brief), respondents ignore completely the Circuit Court's supplemental order of August 2, 1972 which bars petitioners from participating in the selection of members of the Democratic National Committee to serve until 1976, despite the fact that the rules of the National Democratic Party provide that the delegates seated at the 1972 Convention are entitled to choose the National Committee members. The persons chosen by the August 5, 1972 caucus in which respondents participated (as a result of the Circuit Court's supplemental order) have served in the National Committee during the interim period, pending prosecution (at such time as the Circuit Court's order should be vacated) of the challenge filed by petitioners with the Democratic

[8] Respondents apparently seek to imply some criticism of petitioners for not filing their appeal from the Circuit Court's initial order until "twenty-six days after the Circuit Court acted" (p. 5 of their brief). When the Circuit Court order was issued on the evening of July 8, 1972, petitioners, who were then in Miami, Florida for the National Convention, immediately announced publicly their intention to appeal. Following the Convention, it was hoped by petitioners, and widely believed, that respondents would not seek to pursue further proceedings under the July 8 order of the Circuit Court of Cook County. When respondents instituted the contempt proceedings and obtained the supplemental order of August 2, petitioners immediately filed their appeal. Emergency relief was denied at that time, and the Illinois Appellate Court subsequently upheld both the July 8 and the August 5 orders in the judgment appealed from herein.

National Committee (see the Petition for Certiorari at p. 15). In pleadings filed in the Court of Appeals for the District of Columbia, respondents themselves stated that this case is not moot:

> "The case on appeal in Illinois appears to present a 'live' controversy in view of the supplemental injunction which pertains to present representation of Illinois in the Democratic National Committee." Suggestion of Keane, et al. that the Instant Cause Be Dismissed in *Keane* v. *National Democratic Party*, Civil No. 72-1631 (D.C. Cir. January 23, 1973 at p. 4).[8]

3. The judgment below raises fundamental constitutional questions which are of critical, continuing importance to the functioning of American political parties.

The holding of the Illinois Appellate Court is that a national political party convention is "without power or authority" to deny seats to persons chosen as delegates in accordance with state law (at p. B-32) and that persons so chosen have "a legal right [to be seated] properly protected by the courts", (at p. B-26) notwithstanding contrary rules and decisions of the national political party. As set forth in the Petition for Certiorari (at pp. 28-32), it is difficult to exaggerate the significance of that decision, if valid,

[8] Respondents' brief wholly ignores the decision of the Court of Appeals on February 16, 1973, on remand from this Court, after being fully advised of all of the proceedings in this case, that "the 1972 Convention of the National Democratic Party, acting within its competence, seated [Petitioners] at the Convention" (see Appendix E). Respondents' effort to derive support for their position from the Court of Appeals' denial of injunctive relief against the Illinois proceedings (see pp. 4, 9 of their brief) is contradicted by the foregoing holding on the merits and by the Court of Appeals' express statement that it denied injunctive relief because of the absence of "extraordinary circumstances" justifying Federal intervention in a pending state proceeding (see the Petition for Certiorari at p. 11).

for the functioning of American political parties and their national presidential nominating conventions. It raises a recurring question of fundamental importance which would warrant review by this Court even if the judgment below did not have the continuing, critical consequences for petitioners discussed above. Cf. *Dunn* v. *Blumstein*, 405 U.S. 330, 333 (1972).

There is no merit in respondents' suggestion (at p. 15 of their brief) that the case involves an "*ad hoc* situation" which may not be of continuing significance. In 1972 alone, for example, if the judgment below were correct, the Democratic National Convention would have been without power to decide both the California and Chicago credentials contests and could only have seated the delegates chosen under Illinois and California law—very possibly affecting the outcome of the Convention. Repeated similar contests could be cited (*e.g.*, the Georgia contest at the 1952 Republican Convention, the Alabama, Georgia and Mississippi contests at the 1968 Democratic Convention) in which the national conventions of both political parties have refused to seat delegates chosen under state law and have seated contesting delegations (see the Petition for Certiorari at pp. 30-31).[4] As this Court emphasized in *Keane* v. *National Democratic Party*, "for nearly a century and a half the national political parties themselves have determined controversies regarding the seating of delegates to their conventions" (at p. A-5).

The issue goes beyond any specific rules or principles of either national political party and is not eliminated by any possible revisions thereof. If the Illinois decision is

[4] Frequently the national conventions have compromised such contests by seating all or portions of both delegations (see R. Bain, *Convention Decisions and Voting Records* (Brookings 1960)), as was considered by the 1972 Democratic National Convention prior to its final vote on the Chicago contest.

not reversed by this Court, it is a virtual certainty that in every future credentials contest there will be resort to the state courts for relief. Further, the continuing rule-making processes of both national political parties are, under the decision of the Illinois court, rendered largely moot and irrelevant. The question raised by the judgment below is the fundamental one of whether a national political party can be denied the power to enforce its own standards, rules and principles or—if the Illinois courts are correct—is bound to seat delegates chosen under state law, with future credentials contests to be decided not by the national conventions themselves but by the courts. Petitioners submit that the need for review by this Court of the unprecedented decision of the Illinois courts on these fundamental constitutional issues is clear.

In view of the fact that this Court has already once decided the issues presented in the instant case, and the Illinois courts have refused to follow this Court's decision, petitioners respectfully pray that, in these circumstances, this Court issue its writ of certiorari to the Illinois Appellate Court and summarily reverse the judgment of the Illinois Appellate Court on the authority of *Keane* v. *National Democratic Party*. In the alternative, petitioners request this Court to grant the writ and review the substantial Federal questions raised herein.

Respectfully submitted,

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